

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

PAUL DRAY,

Defendant-Appellee.

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UNPUBLISHED

August 7, 2003

No. 242622

Wayne Circuit Court

LC No. 00-005117

Before: Griffin, P.J., and Murphy and Jansen, JJ.

GRIFFIN, P.J. (*dissenting*).

I respectfully dissent. I would reverse and remand for further proceedings.

It is the prosecution's theory that defendant is a homosexual predator who befriended the victim while the victim was a resident at the Northville Regional Psychiatric Hospital. It is alleged that the 52-year-old defendant stalked the thirty-year-old mentally incapacitated victim for several months before kidnapping him for the purpose of engaging in homosexual acts. The majority and I agree that the probate court order appointing a guardian for the alleged victim is clearly relevant to the issue of his mental capacity to consent to be taken and confined by defendant.

While the majority concedes that the alleged victim's mental capacity is a pivotal issue in the case and therefore relevant evidence under MRE 401, it nevertheless concludes that under an MRE 403 analysis the probative value of admitting the probate court order appointing a guardian for him "is *substantially* outweighed by the danger of *unfair* prejudice." (Emphasis added.) Because the factual burden to appoint a guardian for an alleged incapacitated person is "clear and convincing evidence," while the burden in the criminal case is "beyond a reasonable doubt," the majority concludes "[t]here is danger of the jury giving too much weight to the probate court's determination of incapacity, and the possibility that the jury will accept these findings as binding."

In my view, the majority "gives the jury far less credit than is warranted." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In particular, "[i]t is well established that jurors are presumed to follow their instructions." *Id*; *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). While the burdens of proof of "clear and convincing evidence" and "beyond a reasonable doubt" are different, the distinctions are not beyond the comprehension of a jury if properly instructed. The majority's assumption that the jury will either ignore or not understand

an explanatory instruction is not well founded and contrary to our rule of law. *Graves, supra*. For this reason, I would hold that the lower court abused its discretion by excluding the evidence based on MRE 403.

Next, without addressing the issue directly, the majority questions whether the probate court order is inadmissible hearsay evidence. Again, I disagree with the majority.

Pursuant to the Revised Judicature Act, MCL 600.2106, authenticated judgments of any court of record “shall be admissible in evidence in any court in this state”:

A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree.

In regard to this statutory rule of evidence, our Court held in *People v Williams*, 134 Mich App 639; 351 NW2d 878 (1984), that a defendant’s right of confrontation is not violated by the admission of certified court judgments pursuant to MCL 600.2106 because such judgments are a hearsay exception.

In the present case, the majority implies that certified court judgments may not be admissible under Michigan Rules of Evidence 803(23).<sup>1</sup> The scope of this rule of evidence is not clear and the majority acknowledges that the issue is one of first impression in Michigan. Further, pursuant to MRE 101, statutory rules of evidence are effective unless in conflict with a judicial rule:

These rules govern proceedings in the courts of this state to the extent and with the exceptions stated in Rule 1101. A statutory rule of evidence not in conflict with these rules or other rules adopted by the Supreme Court is effective until superseded by rule or decision of the Supreme Court.

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<sup>1</sup> MRE 803(23) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

**(23) Judgment as to Personal, Family, or General History, or Boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

I note that MRE 803(23) is identical to FRE 803(23). The advisory committee's note accompanying FRE 803(23) states in pertinent part as follows:

The leading case in the United States, *Patterson v Gaines*, 47 US (6 How) 550, 559; 12 L Ed 553 (1847), follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. More recent recognition of the principle is found in *Grant Bros Construction Co v United States*, 232 US 647; 34 S Ct 452; 58 L Ed 776 (1914), in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; *United States v Mid-Continent Petroleum Corp*, 67 F2d 37 (10th Cir, 1933), records of commission enrolling Indians admissible on pedigree; *Jung Yen Loy v Cahill*, 81 F2d 809 (9th Cir, 1936), board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. Contra, *In re Estate of Cunha*, 49 Haw 273; 414 P2d 925 (1966).

It appears that judgments regarding matters of personal history would include court determinations of citizenship, alienage, pedigree, and *incompetency*. In any event, because our Michigan Rules of Evidence do not conflict with the statutory rule of evidence, I would apply MRE 101 and rule that the certified court judgment is admissible pursuant to MCL 600.2106.<sup>2</sup>

I would reverse the order of the circuit court and remand for further proceedings.

/s/ Richard Allen Griffin

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<sup>2</sup> Although not addressed by either party, the residual hearsay exception, MRE 803(24) may also be authority for the admission of the probate court judgment. See, generally, *People v Katt*, 468 Mich 272; 662 NW2d 12 (2003).